

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

Case No. 18-20495

v.

Hon. David M. Lawson

Ibraheem Izzy Musaibli,

Defendant.

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Motion for Competency Evaluation Referral

Ibraheem Izzy Musaibli, through his attorneys, the Federal Community Defender for the Eastern District of Michigan, moves this Court to enter an order, pursuant to 18 U.S.C. §§ 4241(a) and 4247(d), to commit him to the Attorney General for the purpose of a competency evaluation. In support of this request, Mr. Musaibli states:

1. Mr. Musaibli is charged with Providing and Attempting to Provide Material Support to a Designated Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B; Conspiracy to Provide Material Support to a Designated Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B; Possessing and Discharging a Firearm (Machine Gun) in Furtherance of a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A),

(B)(ii); and Receipt of Military-Type Training from a Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339D(a).

2. Mr. Musaibli made his first appearance on July 25, 2018, and the Federal Community Defender was appointed.
3. Since appointment, the attorneys with the Federal Community Defender have met with Mr. Musaibli for over 100 hours.
4. During this time, Mr. Musaibli displayed and continues to display varying degrees of ability to comprehend the nature of the charges against him and to recall and process information.
5. Public school testing performed in the second grade reveals Mr. Musaibli's history of deficits in the: long-term recall of factual knowledge; ability to plan; ability to understand temporal sequences; and ability to navigate social interactions.
6. In recent testing, Mr. Musaibli further demonstrated borderline functioning performance in the area of processing speed; performance that is on or near the bottom of low average functioning in verbal comprehension and reasoning; and extremely low functioning in various memory tests.
7. From the beginning, Mr. Musaibli's ability to assist counsel in trial preparation has been marginal. Recently, this ability

became markedly worse. Mr. Musaibli's ability to correctly recall prior discussions and comprehend the significance of legal decisions necessary to advance his case appears to be deteriorating.

8. Mr. Musaibli displayed symptoms that may suggest a neurocognitive disorder, such as: pressured speech (rapid or frantic speech patterns, with limited rational connection); a subrational response to questions; and a preoccupation with his own thoughts that overshadow his ability to communicate with counsel.
9. Because of this deterioration of his mental ability, counsel believes that Mr. Musaibli is presently unable to comprehend his current legal situation and assist properly in his defense as required by 18 U.S.C. § 4241(a).
10. Mr. Musaibli's deficits are most notable when observed over a period of time, rather than immediately obvious during an interview. A more prolonged observation of Mr. Musaibli within a Bureau of Prisons' psychiatric center may result in a more comprehensive picture of his mental state than an evaluation

conducted by a local practitioner or an evaluation at a Bureau of Prisons facility without dedicated mental health staff.

11. A longer period of observation, that includes neuropsychological testing, can be accomplished by committing Mr. Musaibli to the custody of the Attorney General, pursuant to 18 U.S.C. § 4247(d).
12. The United States does not oppose the commitment of Mr. Musaibli for a competency evaluation.
13. This Court must ensure Mr. Musaibli is competent to proceed to trial and defense counsel has an ethical obligation to raise issues relating to competency.
14. Mr. Musaibli also has a Fifth Amendment right against self-incrimination.
15. Due to the nature of Mr. Musaibli's information processing and comprehension issues, the evaluation will likely result in Mr. Musaibli making factual statements regarding his case.
16. In order to allow the Court to make a proper inquiry into Mr. Musaibli's competency, and to protect his Fifth Amendment right, this Court should enter an order directing that the competency report, and any other related reports, prepared by

the Bureau of Prisons not include any statements by Mr. Musaibli relating to the underlying conduct at issue in this case, namely: travel to Syria; his activities in Syria and Iraq; and his relationship with the Islamic State of Syria and al-Sham.

17. Due to the timing of this motion, the Government has not been contacted regarding their position on limiting the transcription of Mr. Musaibli's statements in a competency report.

Mr. Musaibli requests that this Court enter an Order, pursuant to 18 U.S.C. §§ 4241(a) and 4247(d), committing him to the custody of the Attorney General for the completion of a competency evaluation, which should include neuropsychological testing, to determine his competency to stand trial. The Court should order that any factual statement made by Mr. Musaibli related to the factual matters in this case not be included in the report.

Submitted,

s/James Gerometta
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Dated: April 15, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

Case No. 18-20495

v.

Hon. David M. Lawson

Ibraheem Izzy Musaibli,

Defendant.

**Brief in Support of Defendant's Motion for
Competency Evaluation Referral**

Ibraheem Izzy Musaibli is charged with Providing and Attempting to Provide Material Support to a Designated Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B; Conspiracy to Provide Material Support to Designated Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B; Possessing and Discharging a Firearm (Machine Gun) in Furtherance of a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A), (B)(ii); and Receipt of Military-Type Training from a Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339D(a). If convicted of all four charges, Mr. Musaibli faces a minimum of forty years in prison and a maximum sentence of life.

The Federal Community Defender was appointed at his initial appearance in federal court on July 25, 2018.

I. Mr. Musaibli's worsening and deteriorating functioning to intake, process, and recall information directly impedes his abilities to communicate, understand, and assist in his defense.

Over the past 9 months, Mr. Musaibli's defense team members met with and observed him for over 100 hours. Since his initial appearance, Mr. Musaibli struggles to assist his attorneys with the defense of his case. Mr. Musaibli's primary deficits relate to his ability to appreciate his current legal situation and his ability recall and process information.

After repeated interactions with Mr. Musaibli, counsel believed he demonstrated possible neurocognitive deficits. Elementary school records show that testing performed in the second grade revealed a history of deficits in the long-term recall of factual knowledge and deficits in his ability to plan, understand temporal sequences, and navigate social interactions. Based on Mr. Musaibli's history and presentation, counsel retained an expert to conduct a neuropsychological evaluation.

Testing performed for the expert's evaluation shows Mr. Musaibli's range of limitations. These limitations include borderline functioning in processing speed, on or near the bottom of low average functioning in

verbal comprehension and reasoning, and extremely low functioning in various working memory tests. Despite these findings, the expert did not find Mr. Musaibli's primary neuropsychological domains severely affected at the time of the examination.

Within the last month, however, Mr. Musaibli's ability to comprehend the advice and information provided by counsel has become markedly worse. Because of his worsening ability to assist in his defense, counsel had the Federal Community Defender's mitigation specialist meet with Mr. Musaibli. That individual has a master's degree in forensic psychology and a background that includes conducting testing as a psychometrician, facilitating therapy groups, and interviewing persons with mental disorders. She noted pressured speech (rapid or frantic speech patterns, with limited rational connection), a subrational response to questions, and a preoccupation with his own thoughts that overshadow his ability to communicate with counsel.

These symptoms were present in the two subsequent meetings in which counsel attempted to discuss the superseding indictment and impact of new charges with Mr. Musaibli. These symptoms interfered with Mr. Musaibli's ability to intake and process necessary information about

his case, and he showed an inability to rationally explain his thoughts during those meetings.

II. Mr. Musaibli's counsel's representations are sufficient reasonable cause to hold a competency hearing.

Due process requires that a criminal defendant may not be tried unless he or she is mentally competent. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). Competency is defined as the defendant's "ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *Id* at 172. These requirements are codified in 18 U.S.C. § 4241. A competency hearing is required when there is "reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a).

The Court need not hold an evidentiary hearing to determine if reasonable cause exists. "Representations by counsel have been held sufficient." *United States v. Jackson*, 179 Fed. Appx. 921, 932 (6th Cir. 2006) (omitting citation).

Prior to holding a competency hearing, the Court may order a psychological evaluation and report. 18 U.S.C. § 4241(b). This evaluation may take place within the Bureau of Prisons. 18 U.S.C. § 4247(d).

III. Observations of Mr. Musaibli over an extended period of time with professional medical staff is proper to provide a medically-appropriate assessment of his competency.

Although the most recent evaluation report of Mr. Musaibli does not address any significant neurological issues, this report was not specifically prepared to address competency. The local forensic neuropsychologist's report was also necessarily based on limited interactions between the neuropsychologist and Mr. Musaibli. Over time, counsel has come to suspect that Mr. Musaibli may have a neurological and/or other mental deficits that must be addressed prior to the resolution of this case. And that requires an evaluation with multiple interactions and observations between professional staff and Mr. Musaibli.

A referral to the Bureau of Prisons for the preparation of a psychological report is appropriate because it will give the evaluator more opportunity to observe Mr. Musaibli's functioning. In other words, Mr. Musaibli may be able to "hold it together" for an interview, but repeated observations over time will provide a more robust, in-depth picture of his ability to comprehend his situation and rationally assist counsel.

Given that counsel suspects possible neurocognitive issues, placement at a facility with the capability of neuropsychological testing is appropriate.

IV. Protecting Mr. Musaibli's Fifth Amendment rights requires an order excluding any statements he may provide regarding the underlying charged conduct from the competency evaluation report.

Because Mr. Musaibli appears to lack the ability to comprehend the nature of his situation or rationally address the charges against him, he is likely, regardless of any instructions by counsel, to discuss the factual underpinnings of his charges with the evaluator. This creates a tension between the need to ensure Mr. Musaibli's competency and the need to protect his Fifth Amendment right against self-incrimination.

For this reason, the Court should order that the Bureau of Prisons' competency report, and any other report created for such purpose, not include any statements made during the course of the evaluation that relate to his travel to Syria, his activities in Syria and Iraq, and his relationship with the Islamic State of Syria and al-Sham.

Conclusion

For the above reasons, this Court should enter an order committing Mr. Musaibli to the custody of the Attorney General for a competency

evaluation, pursuant to 18 U.S.C. §§ 4241(a) and 4247(d). The order should direct the Attorney General to designate a facility with the capability of neuropsychological testing. Further, the order should direct that the evaluation contain no statements by Mr. Musaibli relating to his travel to Syria, his activities in Syria and Iraq, and his relationship with the Islamic State of Syria and al-Sham.

Submitted,

s/James Gerometta
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Dated: April 15, 2019